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Nov 21 '96

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FEDERAL COMMUNICATIONS  
COMMISSION  
OFFICE SECRETARY

November 21, 1996

VIA MESSENGER

William F. Caton, Acting Secretary  
Federal Communications Commission  
1919 M Street, N.W.  
Washington, D.C. 20554

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FEDERAL COMMUNICATIONS COMMISSION  
OFFICE SECRETARY

Re: WKZF-FM, Inc.  
Station WKZF(FM), Bayboro, North Carolina

Dear Mr. Caton:

Transmitted herewith and filed on behalf of WKZF-FM, Inc., licensee of Station WKZF(FM), Bayboro, North Carolina, is an original and four copies of an amended Petition for Extraordinary Relief. The Petition was filed with the Commission yesterday, November 20, 1996.

However, due to a computer printer problem, the Petition was inadvertently submitted without footnote numbers. For ease of review, please replace the text of the Petition filed yesterday with the attached reprinted Petition. Because the exhibits remain unchanged, they are not being resubmitted with this amendment and should not be discarded. Copies of this amended Petition have been provided to all parties on the attached service list.

If you have any questions regarding the above, please contact the undersigned.

Very truly yours,

*Elizabeth A. Sims*  
Elizabeth A. Sims

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**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

In the Matter of	)	
	)	
<b>WKZF-FM, Inc.</b>	)	FCC File No. BRH-950814UC
	)	MM Docket No. 96-110
For Renewal of License	)	
for Station WKZF(FM)	)	
Bayboro, North Carolina	)	
To: The Commission		

**PETITION FOR EXTRAORDINARY RELIEF**

Pursuant to Section 1.276(f) of the Commission's rules,<sup>1</sup> WKZF-FM, Inc. ("WKZF-FM"), licensee of Station WKZF(FM), Bayboro, North Carolina ("WKZF" or the "Station"), through its attorneys, hereby submits this Petition for Extraordinary Relief in the above-referenced proceeding regarding the renewal of the license for the Station and expedited processing of its pending application for Modification of WKZF. In support thereof, the following is shown:

**A. BACKGROUND**

After acquiring the Station on February 20, 1995 from the creditors of a bankrupt former licensee who had let the Station remain dark since July 24, 1993, WKZF-FM sought approval from the Commission to implement an engineering facility upgrade that would allow the Station to resume broadcasting as expeditiously as possible from a new tower site, given the inoperable condition of the Station's former tower. The Commission granted such approval and modified

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<sup>1</sup> 47 C.F.R. § 1.276(f).

the conditioned assignment to require the Station to return to the air by November 20, 1995.<sup>2</sup> On August 14, 1995, WKZF-FM filed its renewal application for the Station, in which it noted that the Station was still off the air and that the licensee was in the process of developing engineering to implement the upgrade for the Station.

Due to temporary delays in implementing the engineering upgrade created by the need to finalize evaluation of a directional antenna deployment, the Station did not return to the air by November 20, 1995. However, because the licensee had notified the Commission through Exhibit 2 of its renewal application that it essentially would remain off the air until the engineering upgrade was implemented, WKZF-FM, who was not represented by an attorney at the time, was not aware that separate notification to the FCC was required. Nevertheless, the fact that the licensee disclosed the Station's dark status on its renewal application indicates that there was never any intent to deceive the Commission with regard to whether or not the Station was on the air. Yet despite WKZF-FM's demonstrated ongoing good faith efforts to resume broadcasting, on May 9, 1996, the Mass Media Bureau ("Bureau") designated for hearing the application of WKZF-FM for renewal of the license for the Station.<sup>3</sup>

On August 27, 1996, WKZF-FM filed an application with the Bureau for approval to implement the engineering upgrade for the Station in order to return service to the Bayboro community. Subsequently, on August 28, 1996, WKZF-FM filed a Motion for Summary Decision in an effort to expedite processing of its renewal and upgrade applications in light of the

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2      Letter to WKZF-FM, Inc. (Ref. 1800B3-GDG), dated July 25, 1995.

3      Hearing Designation Order, DA 96-96-724, released May 9, 1996 ("HDO").

statutory deadline set by the Telecommunications Act of 1996 that the licenses for all broadcast stations that have been dark for 12 months or more will automatically expire on February 8, 1997 if the stations have not resumed broadcast operations by that date. The Bureau filed its Opposition to the Motion for Summary Decision and Countermotion for Summary Decision on September 5, 1996. A Reply thereto was filed by WKZF-FM on September 13, 1996, and the Bureau's Motion to Dismiss the Reply was filed September 17, 1996.

Through the detailed facts set forth in its earlier pleadings in this proceeding,<sup>4</sup> WKZF-FM has shown that it has acted diligently and in good faith to return the Station to the air since it acquired the license in the spring of 1995. When it acquired the license, the former tower site was inoperable and not in the condition to be repaired and the Station had been dark for some time. WKZF-FM has since arranged for operation of the Station from a new site and has obtained the technical and financial support necessary to return the Station to the air within 60 days. Yet despite this showing, in a Summary Decision released September 24, 1996, Administrative Law Judge John M. Frysiak denied WKZF-FM's Motion for Summary Decision and granted the Bureau's Countermotion.<sup>5</sup> Under the Summary Decision, the renewal application for WKZF was denied and the station's license was canceled. However, the pending application to upgrade the facilities of WKZF was not dismissed in that decision and has not been dismissed to date. On September 27, 1996, public notice of the Summary Decision was given in Report No. 43835 of the Commission's daily releases.

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4 Copies of these pleadings are attached as Exhibit A.

5 A copy of the Summary Decision is attached as Exhibit B.

## **B. ARGUMENT**

Under the Commission's rules, WKZF-FM had the procedural option of filing exceptions to the Summary Decision within 30 days of the release date of that decision, or by October 24, 1996. Furthermore, the Commission had the option of reviewing the decision on its own motion until November 13, 1996. WKZF-FM heavily weighed its option to file exceptions to the Summary Decision but ultimately decided that it was not a prudent business decision for the small business licensee to invest further financial resources to further appeal the case in light of the impending statutory deadline to return the Station to the air.<sup>6</sup> This decision was also taken on the basis of indications received informally from the Bureau and Commission staff that the ultimate decision on appeal would not be able to be processed in enough time to enable the Station to meet that February deadline. The Commission has not chosen to review the decision on its own motion to date.

Section 1.276(f) of the Commission's rules provides that when a party "fails to file exceptions within the specified time to an initial decision which proposes to deny its application, such party shall be deemed to have no interest in further prosecution of its application, and its

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<sup>6</sup> As a small business attempting to serve a small rural community, WKZF(FM) is particularly deserving of the Commission's most favorable consideration. Section 277 of the Telecommunications Act of 1996 as well as the Small Business Growth and Fairness Act of 1996, Public Law 104-121, clearly direct the Commission to pay attention to and affirmatively to help small business and not to erect barriers to their growth and development. Further, the Commission now is engaged in a proceeding in an effort to foster small business participation in the Telecommunication Industry through its Notice of Inquiry in GN Docket No. 96-113. (FCC No. 96-216; adopted May 10, 1996; Released May 21, 1996).

application *may* be dismissed for failure to prosecute.”<sup>7</sup> However, the Commission has held that the permissive nature of this rule on its face be interpreted narrowly to allow further interest in a dismissed application where the time for filing exceptions and Commission review has passed only under “extraordinary circumstances.”<sup>8</sup> Because the circumstances in the instant case are both novel and extraordinary, particularly due to the urgency presented by the recently imposed statutory deadline as specified in the Telecommunications Act of 1996, the Commission should review Judge Frysiak’s Summary Decision despite the fact that WKZF-FM did not file exceptions to it.

Just five days ago, in Southwestern Broadcasting Corporation, MM Docket No. 96-104, File No. BRH-900315UC, FCC 96-443, released November 15, 1996, the Commission reversed the Summary Decision of Administrative Law Judge Richard L. Sippel (“ALJ”) which had denied Southwestern’s renewal application and canceled the license for Station KLZK(FM), Brownfield, Texas.<sup>9</sup> KLZK has been off the air for several years and, like WKZF-FM, filed its application to modify the station’s facilities after an HDO was issued to consider the same issues which were presented in the HDO in the instant case. In both cases, the Bureau has maintained the position that it will not expedite processing on pending modification applications where the underlying station license renewal is subject to review under an HDO. The Bureau has disregarded the statutory deadline of February 8, 1997 in enforcing this illogical policy. As

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7 47 C.F.R. § 1.276(f) (emphasis added).

8 See Frank K. Spain, 77 RR2d 12, 13 (1995).

9 Attached as Exhibit C.

applied to the instant proceeding, the Bureau's refusal to process the licensee's pending modification application because consideration of the Station's renewal application was designated for hearing has made it impossible for WKZF-FM to obtain the authority necessary to return the Station to the air, and thus, its renewal application was denied and its license canceled.

In Southwestern, the Commission has stated that failure to take steps toward resumption of service *before* issuance of the HDO is not fatal to the application.<sup>10</sup> The Commission further notes in that decision that, with respect to the Bureau's stated policy to assist stations facing the statutory deadline by expeditiously acting on applications that are required to return a station to the air, the Bureau never indicated an exception to that policy for actions taken after designation for hearing.<sup>11</sup> Because Southwestern had made diligent efforts to acquire financial and technical means to return the station to the air, the Commission ordered the Bureau to reinstate and process Southwestern's modification application on an expedited basis, and if the application is technically complete and otherwise grantable, issue a construction permit by December 6, 1996 to allow sufficient time for Southwestern to construct and resume operations prior to the statutory deadline.<sup>12</sup> Action on the renewal application and the exceptions filed by Southwestern is to be held in abeyance pending further order of the Commission.

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10 Southwestern at 2.

11 Id. The Bureau's policy is stated in Procedures Announced for Expedited Processing of Applications Filed by Silent Broadcasting Stations (Public Notice), DA 96-818, released May 22, 1996.

12 Id.

In all fairness, WKZF-FM asks for nothing more than the Commission has granted Southwestern. As in Southwestern, WKZF-FM has diligently acquired both the financial and technical capabilities to return the Station to the air and thus should have been allowed to do so before Judge Frysiak decided purely on the basis of a minor procedural mistake by WKZF-FM that it was impossible to return the Station to the air by February and thus subsequently denied WKZF's renewal application and canceled the Station's license.<sup>13</sup> WKZF-FM was trapped in a no-win situation where neither the Bureau nor Judge Frysiak would grant the respective application under consideration without the grant of the other application by the other party. In light of the Commission's recent decision in Southwestern, WKZF-FM urges the Commission to reverse Judge Frysiak's decision, reinstate the Station's license, and order the Bureau to expeditiously consider the modification application. As in Southwestern, if the application is technically complete and otherwise grantable, the Bureau should grant it and allow the issues considered in the renewal proceeding to be considered after the Station is returned to the air. If WKZF-FM does not return the Station to the air by the statutory deadline, the license will expire automatically and the Commission would have no further action to take with regard to this proceeding except to terminate it. Thus, the Commission has nothing to lose and the community

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13 WKZF(FM) notes that in two factually similar cases, the simple administrative mistake of the licensee in not filing a request for an additional period in which to remain silent was not dispositive or fatal to the license renewal application. See: In the Matter of WPVG, Inc. for Renewal of License for Station WPVG(AM) Funkstown, Maryland; FCC 96D-05; (Issued: September 3, 1996; Released: September 5, 1996); In the Matter of Hometown Media, Inc. for Renewal of License for Station WAYB(AM) Waynesboro, Virginia; FCC 96D-06; (Issued: September 13, 1996; Released September 17, 1996).



of Bayboro, North Carolina has everything to gain by a Commission grant of this request which would allow the license to offer a first local service to the community.

The critical issue in this proceeding has been and remains whether grant of the renewal application (or now, reinstatement of the license) serves the public interest. The public interest of the Bayboro, North Carolina community is surely not best served by the cancellation of the Station's license. Such cancellation, if allowed to stand, will assure that the Bayboro community will lose much-needed local radio broadcast service for years to come, if not permanently. The alternative, to reinstate the license, will allow the licensee the opportunity to return the Station to the air and effectively serve the Bayboro public. Thus, WKZF-FM urges the Commission to reinstate the Station's license and order the Bureau to expeditiously process the pending upgrade application, in the interest of the public and the community of Bayboro.

*(continued on next page)*

## **CERTIFICATE OF SERVICE**

I, Tracy L. Trynock, do hereby certify that I have, this 21st day of November, 1996, caused to be sent by hand delivery copies of the foregoing "Petition for Extraordinary Relief" of WKZF(FM), Inc. to the following:

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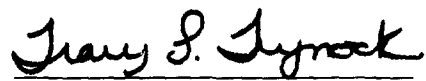
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Hon. John M. Frysiaak  
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Washington, D.C. 20554

A handwritten signature in black ink, reading "Tracy L. Trynock". The signature is written in a cursive style with a horizontal line underneath.

Tracy L. Trynock